

# COMPENDIUM OF SELECTED DECISIONS ON ADVERSE ACTIONS INVOLVING LEAVE

*U.S. Office of Personnel Management  
Employee Relations Division  
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## **LEAVE**

### **GENERAL**

**As a general rule, an agency may not take an adverse action against an employee based on the employee's use of approved leave.**

*Wilkinson v. Air Force*, 68 M.S.P.R. 4 (1995)

(Former employee petitioned for review the agency's removal for failure to request leaves according to established procedures.) As a general rule, agency's approval of leave for unscheduled absences precludes agency from taking adverse action on basis of those absences.

*Webb v. USPS*, 10 M.S.P.R. 536 (1982)

Agency removed employee based on excessive absenteeism.) Agency's grant of leave without pay to employee could not be used as specification in support of removal action, and adverse action taken by agency against an employee based on periods of approved leave would not be for such cause as would promote efficiency of the service.

**There is a very rare exception to that rule and the Board has identified specific criteria that must be met when removing an employee on approved leave under this exception:**

1. The employee must be absent for reasons beyond his or her control; 2. the absence must have continued beyond a reasonable period of time and the agency must warn the employee of possible adverse action if the employee does not return to duty; and 3. the agency must show that it needs the employee's services on a regular schedule.

*Smisson v. Air Force*, AT0752990177-I-1, March 9, 2000

(Appellant removed for excessive absences). Issue was whether the agency's removal action satisfied the criteria under *Cook*.

-Absences due to personal affairs are not covered by the *Cook* exception.  
(Discuss periods of interim leave) (Part-time employee)

*Gaskins v. Air Force*, 36 M.S.P.R. 331 (1988)

Agency could remove employee for continuous unscheduled absence on leave without pay, even though action was based on approved leave, as employee was

absent for compelling medical reasons and agency approval or disapproval of her leave request was immaterial, her absence continued beyond reasonable time and she was warned that adverse action could be taken unless she became available for duty and agency established that it needed to fill her position on regular basis.

*Cook v. Army*, 18 M.S.P.R. 610 (1984)

(Army Department employee was suspended for 40 days for excessive absenteeism and non-availability for work). The Board found that when an agency approves leave, it releases the employee from the obligation to report, and therefore, such absence is not considered to be a breach of the employer employee relationship, and thus an adverse action based on a record of approved leave would not promote the efficiency of the service. This should be applied only in unusual cases, and is not warranted in this case.

**The Board recently clarified that it considers this exception only in situations where the employee is using LWOP. It specifically denied the use of the exception in a situation where the employee was using approved sick leave.**

*Holderness v. Defense Commissary Agency*, 75 M.S.P.R. 401 (1997)

(Exception agency did not charge the employee with failing to properly request leave.) Where record showed that employee was on sick leave for entire period of charged absences, agency failed to prove that employee was on leave LWOP status during that time, and thus Cook exception, which allows agency to take adverse action based on approved unscheduled absences when employee makes excessive use of unscheduled LWOP, didn't apply to allow employee's removal.

**An agency may take an adverse action against an employee only for such cause as will promote the efficiency of the service (5 U.S.C. 7513 (a)). The Board and the courts have held that an employee's unauthorized absence, by its very nature, adversely affects the agency's ability to accomplish its mission and that disciplinary action based on a charge of unauthorized absence is warranted to promote the efficiency of the service.**

*Roberson v. Veterans Affairs*, 27 M.S. P.R. 489 (1985)

Unauthorized absence from duty is proper ground for removal since by its very nature, it disrupts efficiency of the service.

*Desiderio v. Navy*, 4 M.S.P.R. 84 (1980)

Where evidence clearly established employee's unauthorized absences from duty and that such absences increased administrative costs and decreased productivity, there was no basis to concluded that presiding official erred in

determining from the evidence presented that employee's removal promoted efficiency of the service.

## **ANNUAL LEAVE**

**A supervisor has the discretion to approve or disapprove the use of accrued annual leave based upon the work needs of the office. In cases where annual leave has been denied and adverse action is taken based on an AWOL charge, the Board will review the agency's decision to ensure that the leave was properly denied.**

*Dobert v. Navy*, 74 M.S.P.R. 148 (1997)

Board will review agency's denial of request for annual leave.

**Unused annual leave does have cash value upon separation, however, no payment is made for accumulated sick leave when an employee retires or separates.**

*Coffey v. USPS*, NY0752910454-X-3, April 7, 2000

(Employee claimed that after interim relief benefits terminated and before his retirement, he was forced to begin using annual leave to remain in pay status, and that the agency made him "forfeit" 641 hours of sick leave.)

-Board held that employee was incapacitated for duty for the 13 week period that ended on April 29, 1994, that he should be permitted to substitute whatever sick leave he had available for use during that period for the annual leave that he used and that he is entitled to payment for any resultant unused annual leave.

**The issue of approval or denial of annual leave in situations where an employee is incarcerated has been raised at the Board in several cases. For example, an agency may not automatically deny annual leave to an employee who must serve a jail sentence, but must consider the impact of the employee's absence on agency operations and the length of the potential absence.**

*Benally v. Interior*, 71 M.S.P.R. 537 (1996)

(Appellant was arrested and driving with revoked license, result of charge ordered to serve 7 days in jail and drivers license revoked. Agency charged failure to maintain required qualifications and AWOL. --Appellant requested annual leave supervisor approved leave request but later denied the leave prior to its effective date and charged the appellant awol for the period.) The Administrative Judge erred in sustaining AWOL charge resulting from agency's denial of employee's request for leave during seven-day period of his incarceration, where agency did not make showing that at time, it had determined that it needed employee on job, and where agency first approved employee's request for annual leave before learning reason for request.

**This is in contrast to the Board's position when the employee facing incarceration does not have annual leave available. The Board has found that the agency need not approve LWOP to cover a period of incarceration nor does it have to justify its decision.**

*Johnson v. DLA*, 54 MSPR 370 (1992)

Agency is not required to grant an employee leave without pay to cover an absence due to his arrest and incarceration. Agency authorization of LWOP is matter of discretion and employees are not entitled as matter of right. When disciplinary action is based on a charge of AWOL because of a denial of LWOP, board may review surrounding circumstances to determine whether the denial was reasonable.

*Hawkins v. Navy*, 49 MSPR 501 (1991)

Agency did not have to grant employee LWOP to cover his absence for 16 successive work days due to his arrest and incarceration. (Agency denied request for LWOP to cover his absence and placed him in AWOL status.)

**When an employee is incarcerated, an agency is not required to participate in a prison work-release program (absent any agency regulation to the contrary). An AWOL charge will be supported, even though the agency could have chosen to have the employee work.**

*Huettner v. Army*, 54 M.S.P.R. 472 (1992)

Agency was not obligated by law, rule, or regulation to accept employee for duty under work-release program so as to preclude AWOL charge, based on employee's absence of more than one month resulting from his incarceration, and also was under no obligation to provide information verifying his employment.

*Abrams v. Navy*, 22 M.S.P.R. 480 (1984)

Agency was not obligated by law, rule, or regulation to accept employee for duty under work-release program so as to preclude AWOL charge based on absence resulting from employee's incarceration. (Court case affirmed B table)

**Removal for AWOL will be sustained when the appellant was sentenced to 10 years imprisonment and was immediately placed under custody of the state authorities and, as a result, was unable to report to duty.**

*Rojas, Jr. v. USPS*, 74 M.S.P.R. 544 (1997)

(Employee sentenced to 10 years imprisonment - agency removed for AWOL.)  
Agency established its AWOL charge; it was undisputed that employee was sentenced to serve a 10-year prison term and that he was immediately remanded to custody of Texas Department of criminal justice, and it was also undisputed that, due to his incarceration, employee was unable to report for duty.

### **SICK LEAVE**

**Generally, employees have a right to use sick leave as needed for proper reasons. Moreover, an agency is required to grant sick leave to an employee who provides administratively acceptable evidence that he or she is incapacitated for the performance of duties due to illness or injury. However, an agency may disapprove sick leave in nonemergency**

**situations or if an employee does not submit administratively acceptable evidence. An employee must apply for sick leave within the time limits set by the agency. In addition, an agency may request administratively acceptable evidence for any duration of sick leave.**

*Rison v. Navy*, 23 M.S.P.R. 118 (1984)

Agency is required to grant sick leave when employee is incapacitated for performance of his duties due to sickness; however, employee must apply for sick leave within time limits set by agency, and agency may grant request for sick leave only when such request is supported by administratively acceptable evidence.

**Documentation that supports an absence for sick leave purposes may be presented as late as the Board hearing and if the Board finds the documentation to be administratively acceptable, an agency's AWOL charge would be reversed.**

*Carr v. Department of Defense*, 61 M.S. P.R. 172 (1994)

In reviewing propriety of agency's AWOL determination, the Board will examine medical evidence presented for first time to Board, as well as any medical documentation presented to agency. Submission of medical evidence that does not provide the agency with sufficient information about the employee's prognosis, restrictions of work duties, or expected return to duty may not be sufficient to support the request for leave and the agency may deny the use of sick leave.

*Riley v. Army*, 53 M.S.P.R. 683 (1992)

-While an employee is required to submit written application for sick leave within time limits set by agency, agency must grant sick leave to an employee who has provided it with administratively acceptable evidence that she was incapacitated for performance of her duties due to illness or injury regardless of whether employee has complied with applicable procedures.

-Employee presented administrative acceptable evidence of physical incapacity during relevant time period, charge of AWOL could not be sustained where doctor testified that entire period of employee's absence was medically justified by employee's pregnancy and delivery of baby.

*Goens v. Army*, 40 M.S.P.R. 456 (1989)

Removal of employee for excessive unauthorized absence after receipt of additional medical documentation did not deny employee due process; Deputy Commander had given employee a couple more days to submit additional documentation after oral reply and documentation submitted failed to inform agency of employee's prognosis, restrictions on her performance of duties, or her expected return to duty.

## **LEAVE WITHOUT PAY (LWOP)**

**Agency authorization of LWOP is a matter of discretion and employees are not entitled to it as a matter of right.**

*Johnson v. DLA*, 54 M.S.P.R. 370 (1992)

Agency authorization of LWOP is matter of discretion and employees are not entitled to it as matter of right.

*Kelmon v. Justice*, 27 M.S.P.R. 581 (1985)

Agency's decision whether to grant advanced sick leave may be analogized to its decision whether to grant LWOP, since employees in both situations have no right to the leave on demand.

Note: For decisions on the Family and Medical Leave Act of 1993 (FMLA), refer below under "Family and Medical Leave Act."

### **DENIAL OF LWOP**

**When an agency bases a disciplinary action on a charge of AWOL because of a denial of LWOP, the circumstances of the denial will be reviewed by the Board to determine if the denial was reasonable. A denial of LWOP may be supported when there is no foreseeable end in sight to the absence and the agency demonstrates that the ongoing absence has resulted in a burden to the agency.**

*Young v. Veterans Affairs*, 83 M.S.P.R. 187 (1999)

Denial of leave without pay (LWOP) is reasonable even in the fact of medical evidence showing that the employee is unable to work if there is no foreseeable end in sight to the employee's absence and the absence is a burden to the agency.

*Bologna v. Department of Defense*, 73 M.S.P.R. 110 (1997)

There was no foreseeable end to employee's absence and his absence was burden to agency, and thus agency did not act improperly in denying employee's request for leave without pay and in removing him on charge of absence without leave; physician's reports indicated that employee was totally and permanently disabled.

*Joos v. Treasury*, 69 MSPR 398 (1996)  
(holding same as above)

*Joyner v. Navy*, 57 M.S.P.R. 154 (1993)

Where disciplinary action results because leave without pay is denied and employee is placed on AWOL, the Board will review circumstances to determine if denial was reasonable.

*Fisher v. Department of Defense*, 54 M.S.P.R. 675 (1992)

When disciplinary action is based on charge of absence without leave because of denial of leave without pay, Board will review circumstances of denial to determine if denial was reasonable.

*Haine v. Navy*, 41 M.S.P.R. 462 (1990)

When disciplinary action is based on charge of AWOL because of denial of leave, MSPB will review circumstances to determine if denial was reasonable. (Removed for submitting false questionable travel documentation, refusing to cooperate in an official investigation and excessive unauthorized AWOL for more than five consecutive workdays.)

*Henderson v. USPS*, 36 M.S.P.R. 11 (1987)

When disciplinary action is based on charge of AWOL because of denial of leave, circumstances of denial will be reviewed to determine if denial of leave is reasonable.

*Lehnerd v. OPM*, 27 M.S.P.R. 525 (1985)

Inasmuch as agency's claim of workload and backlog problem in processing retirement claims was supported by the record and employee's ability to return to work was uncertain, due to incapacitating back problem, agency denial of further leave without pay was not an abuse of discretion; hence, employee's continued unauthorized absence from retirement claims technician position warranted removal, since, by its very nature, it disrupted efficiency of the service.

*Kamer v. Navy*, 6 M.S.P.R. 184 (1981)

Where employee had already been absent from his position for two years due to on-the-job injury and he was facing surgery with postoperative prognosis of 45% permanent disability, agency acted reasonably in denying further leave without pay and in placing employee on absent without leave status and thereafter removing him for excessive unauthorized absence, there being no foreseeable end to employee's disability and his absence having been shown to have become a burden to the agency in getting its assignments done.

### **ABSENCE WITHOUT LEAVE (AWOL)**

**To prove a charge of AWOL, the agency must show that the appellant was absent, and that his absence was either not authorized, or that his request for leave was properly denied.**

*Digiulio v. Treasury*, 66 M.S.P.R. 659 (1995)

(Dealing with attorney fees and settlement). To prove absence without leave (AWOL) charge, agency was required to show that employee was absent and either that her absence was not authorized or that her request for leave was properly denied.

*Castellanos v. Army*, 62 M.S.P.R. 315 (1994)

Agency failed to establish charge that employee was AWOL and there was no record evidence that employee was on leave restriction status that required him to document every unscheduled leave request.

*Boscoe v. Agriculture*, 54 M.S.P.R. 315 (1992)

(Holding same as above)

*Staten v. USPS*, 26 M.S.P.R. 206 (1985)

(Holding same as above)

**The Board may sustain a charge of AWOL even when the agency fails to prove that the employee was AWOL for the entire period.**

*Senior v. USPS*, 85 M.S.P.R. 283 (2000)

The Board may sustain a charge of absence without leave (AWOL) even when the agency fails to prove that the employee was AWOL for the entire period.

**It is permissible to take an adverse action for AWOL and failure to follow established leave procedures, even in cases where the absence is later approved by the agency or a third party. In cases where the unauthorized absence is ultimately approved, the Board will sustain the agency's charge of failure to follow established leave procedures as long as the employee was on proper notice of the established procedures.**

*Wilkinson v. Air Force*, 68 M.S. P.R. 4 (1995)--non-Postal agencies

-Agency's approval of leave for unscheduled absences precludes agency from taking adverse action on basis of those absences.

-Agency could discipline employee who was aware of requirement that he request leave for which leave had not been previously approved, yet failed to follow those procedures.

-Charge of failure to properly request sick leave, annual leave, or LWOP can be maintained by agency that is bound by laws and regulations that govern leave administration in civil service, even though agency eventually approves leave request, or the Board on review determines that agency's denial of leave request was reasonable, so long as employee is on notice of agency's requirement; (overruling Yartzoff, 38 M.S.P.R. 403, Young 36 M.S.P.R. 473)

*Fleming v. USPS*, 30 M.S.P.R. 302 (1986)--Postal Service only

-(Modifying Webb, Postal Service employees have neither a statutory nor regulatory entitlement to use of annual or sick leave.)

-(Postal Service may not discipline on basis of approved leave, its permissible to predicate discipline on failure to follow leave requesting procedures providing employee is on clear notice of such requirements and discipline for continued failure to comply.)



-(Postal Service properly removed employee on basis of unscheduled nature of his 35 absences notwithstanding employee's use of approved leave repeated and clear counseling regarding probability of punishment for continued offenses.)

**However, distinguish *Westmoreland v. DVA*, 83 M.S.P.R. 625 1999. In that case, the Board applied long-standing charging rules and found the two charges must be merged because the agency gave as its sole reason for the AWOL charge the employee's failure to follow leave requesting procedures. In supporting the two charges, an agency must distinguish the lack of approval that supports the one charge from the failure to follow specific rules that supports the other.**

Charges of failure to follow leave-requesting procedures and absence without leave would be merged where they did not involve different misconduct or element of proof i.e. the charge of AWOL was based solely on the employee's failure to follow leave-requesting procedures.

**Law enforcement officials may be held to a higher standard of conduct than other Federal employees, even for charges of AWOL.**

*Hartigan v. Veterans Affairs*, 39 M.S.P.R. 613 (1989)

Law enforcement official may be held to higher level of conduct than other Federal employees.

**In very rare cases, an agency can charge AWOL even if an employee is physically present, on the basis that the employee is not reporting for duty at the location where he is assigned. These situations are unique and there is little case law to review. For example, an AWOL charge was sustained in case where appellant reported for duty but left the worksite. Evidence supported the finding that the employee was required to request leave for his absence and that he was properly charged with failure to obtain leave for his absence.**

*Meads v. Veterans Affairs*, 36 M.S.P.R. 574 (1988)

Evidence supported finding that employee was AWOL for two and one-half hours on particular day he reported for appointment at agency's clinic; even assuming that employee told a clinic technician that he was going to the canteen for lunch or that his name was not paged over the loudspeaker, employee did not have permission to leave the clinic where he was supposed to be and he did not reasonably explain the need for his absence from the clinic.

**A charge of AWOL was sustained for appellant who failed to report to work for a temporary duty assignment, notwithstanding the fact that he continued to report to duty at his previous office. The Board held that an employee cannot choose where to work in derogation of an agency order.**

*Rodriquez v. Agriculture*, 27 M.S.P.R. 78 (1985)

Employee was AWOL where he failed to report to work for temporary duty assignment, notwithstanding that he continued to report for duty at his previous office.

**Removal of appellant is sustained in case where employee failed to report for assigned overtime work.**

*Abrams v. Navy*, 12 M.S.P.R. 515 (1982), aff'd 22 M.S.P.R. 40 (1984)

Where employee explained his unexcused absence by attendance on his sick father and a bedside visit to his wife's uncle who was critically ill and hospitalized, but record was devoid of hospital records, statements and testimony of doctors, nurses, hospital administrators, employee's father and wife or other witnesses to support his explanation, employee failed to provide satisfactory documentation for unscheduled absence and agency did not abuse its discretion in denying employee leave without pay and in charging him with AWOL. (Employee was removed from position of painter on charges of second offense of being away from assigned job during working hours without proper permission, unexcused absence from assigned overtime, office-duty misconduct in which he shot and wounded another person, resulting in his criminal conviction of five charges, and his excessive unauthorized absence.)

*Farrell v. Veterans Administration*, 14 M.S. P.R. 94 (1982)

Employee who had volunteered to work overtime, but then failed to appear without any request to be excused, was properly charged with failure to call or report for overtime duty as scheduled, notwithstanding provision of collective bargaining agreement permitting employee to be excused from overtime upon request.

**A charge of AWOL cannot be sustained if the employee's claim with the Office of Workers' Compensation (OWCP) is approved.**

*Parkinson v. USPS*, 55 M.S.P.R. 552 (1992)

Removal based on AWOL cannot be sustained if employee show that his absence was substantially related to compensable injury, fact that Office of Workers' Compensation Programs (OWCP) awarded employee compensation for absence resulting from a work-related injury will not excuse other absence.

*Mainor v. Navy*, 38 M.S.P.R. 528 (1988)

Charge of AWOL cannot be sustained where OWCP determines that compensation is payable for period covered by the charge.

*Stith v. HUD*, 21 M.S.P.R. 328 (1984)

Charge of failing to follow order to report for work and of being AWOL could not be sustained, given decision of OWCP that employee's compensation claim was

payable for time period which included entire interval during which the charged conduct occurred.

### **FAMILY AND MEDICAL LEAVE ACT (FMLA)**

**The Board held that it has jurisdiction over FMLA claims and that because FMLA has its own leave requesting procedures, an AWOL charge will be reviewed in light of an appellant's right to absence under the Act. FMLA does not augment an employee's leave balance; rather, it only entitles an employee to approved absence, under which the employee could substitute accrued paid leave.**

*Young v. Veterans Affairs*, 83 M.S.P.R. 187 (1999)

Where employee's unpaid leave lasted for more than 12 weeks, the Family and Medical Leave Act (FMLA) did not preclude sustaining charge of excessive use of unpaid leave.

*Jefferies v. Navy*, 78 M.S.P.R. 255 (1998)

Agency bears the burden of proving that, in taking a leave-related disciplinary action, it properly denied an "eligible" employee leave under the Family and Medical Leave Act. (Removal for excessive unauthorized absence and for failure to follow leave procedures.)

*Joos v. Treasury*, 74 M.S.P.R. 684 (1997)

Based on employee's medical submissions and doctor's submission indicating that employee had been in his continuing care, employee met requirement for leave under Family and Medical Leave Act, thus further supporting finding that agency was unreasonable in its denial of leave without pay status, in contravention of provision of settlement agreement, in light of agency's refusal to supply FMLA application forms requested by employee.

*Crutchfield v. Navy*, 73 M.S.P.R. 444 (1997)

Family and Medical Leave Act (FMLA) does not argument employee's leave balance; it merely entitles employee to approved leave for certain covered reasons and gives employee option of using accrued paid leave or leave without pay (LWOP).

*Ramey v. USPS*, 70 M.S.P.R. 463 (1996)

On appeal from removal action, Postal Service employee could rely on Family and Medical Leave act as defense against charge of absence without leave, where employee alleged that his AWOL as well as his irregular attendance resulted from his depressive illness; since FMLA had its own procedures for both requesting and granting of leave, employee might have qualified for FMLA leave for time which had been charged as AWOL.

**Recent decisions by the Board have placed a burden on the agency to inquire whether an employee's request for leave constitutes a request under FMLA (see Burge and Fairley below).**

*Burge v. Air Force*, 82 MSPR 75 (1999)

Agency bears burden of proving that in taking a leave-related disciplinary action, it properly denied an “eligible” employee leave under Family and Medical Leave Act.

*Fairley v. USPS*, 82 MSPR 588 (1999)

Where the facts, either specifically raised by the appellant or otherwise shown by record evidence, implicate the Family and Medical Leave Act (FMLA) relative to a leave related charge, the Board will consider and apply the FMLA without shifting the burden of proof to the employee.

*Gardner v. USPS*, 79 M.S.P.R. 9 (1998)

Where the facts, either specifically raised by the appellant or otherwise shown by record evidence, implicate the Family and Medical Leave Act (FMLA) relative to a leave related charge, the Board will consider and apply the FMLA without shifting the burden of proof to the employee.

*Gross v. Justice*, 77 M.S.P.R. 83 (1997)

Agency bears burden of proving that it properly denied Family and Medical Leave Act (FMLA) leave in taking absent without leave (AWOL) action against employee who is eligible for leave under FMLA.

**In a last chance settlement agreement case the agency has the burden of proof to show that it did not interfere with the appellant's FMLA rights in taking its action.**

*Covington v. Army*, AT0752000124-I-1, April 22, 2000

-The Board found that the appellant's allegations, if proven, may establish a prima facie case that she was not AWOL and that the agency breached the settlement agreement by charging her with 5 hours' AWOL and removing her, when the agency knew or should have known that she was requesting leave under the FMLA for that time period and that she was entitled to such leave.

-The appellant made a nonfrivolous allegation that the agency breached the parties' settlement agreement by charging her with 5 hours of AWOL and removing her, requiring a jurisdictional hearing.

**An agency may apply its own leave procedures to leave requests under FMLA but an agency may not apply a more restrictive leave policy than that provided under FMLA.**

*Burge v. Air Force*, 82 MSPR 75 (1999)

Agency may apply its own leave procedures to leave requests under FMLA but agency may not apply a more restrict leave policy than that provided under FMLA

and may not deny employee leave under FMLA for failure to follow agency's leave procedures.

**An employee is not required to explicitly invoke FMLA in requesting covered leave. It is sufficient that the employee make the agency aware of circumstances that would warrant leave under FMLA.**

*Landahl v. Commerce*, 83 M.S.P.R. 40 (1999)

An employee is not required to explicitly invoke the FMLA in requesting covered leave, it is sufficient that the employee make the agency aware of circumstances that would warrant leave under the FMLA.

*Gross v. Justice*, 77 M.S.P.R. 83 (1997)

Employee is not required to explicitly invoke FMLA in requesting covered

*Ellshoff v. Interior*, 76 M.S.P.R. 54 (1997)

Employee's failure to explicitly invoke Family and Medical Leave Act (FMLA) in her notice of intended leave due to depression did not render that notice deficient under FMLA.

**The Board has jurisdiction to hear Family and Medical Leave Act (FMLA) claims raised in a petition for enforcement or a petition for review properly before it.**

*Moore v. USPS*, 83 M.S.P.R. 533 (1999)

Board has jurisdiction to hear Family and Medical Leave Act claims raised in a petition for enforcement or a petition for review properly before it.

**An employee is "eligible" for FMLA leave if he was employed for at least 12 months by the employer from whom leave is requested and performed at least 1,250 hours of service during the 12-month period prior to the leave request.**

*Moore v. USPS*, 83 M.S.P.R. 533 (1999)

With respect to provision of the Back Pay act stating that "for all purposes" an employee is deemed to have performed service during the period for which the employee received back pay, the phrase "for all purposes" encompasses the eligibility requirements of the Family and Medical Leave Act.

**The Court of Appeals for the Ninth Circuit reaffirmed that Federal employees who believe their rights under FMLA have been violated must pursue a remedy through appropriate grievance procedures and may not file suit against the Government in court.**

*Russell v. United States*, 191 F.3d 1016 (Sept. 14, 1999)

## **INABILITY TO MAINTAIN A REGULAR WORK SCHEDULE**

*Ramey v. USPS*, 70 M.S.P.R. 463 (1996)

Agency removed for failure to satisfactorily maintain a regular schedule owing to the use of unscheduled leave.

*Lucas v. USPS*, (1989) 39 M.S.P.R. 459 (1989)

Employee was removed for continuous absence without official leave and for failure to maintain a regular schedule/absenteeism. case went to arbitration then to MSPB.

*Simms v. USPS*, 39 M.S.P.R. 308 (1988)

Removal for failure to maintain assigned schedule and absence without leave (AWOL).

*Hayslett v. USPS*, 38 M.S.P.R. 267 ((1988)

In effecting removal agency also considered elements of past disciplinary record and a letter of warning for failure to maintain a regular work schedule.

*Henderson v. USPS*, 36 M.S.P.R. (1987)

Removal for failure to maintain a regular schedule.

*Krainz v. Army*, 33 M.S.P.R. 554 (1987)

Employee appealed his removal for failing to maintain proper work schedule. Allegedly handicapped employee failed to show that agency failed to accommodate his handicap, and thus agency could remove him for failing to maintain proper work schedule; while employee alleged that he would have been able to work on some occasions when he was absent had agency accommodated him by means of temporary detail or permanent reassignment to light duty position, employee presented no evidence that either of those accommodations would have fully restored his ability to be regular in attendance.

*Fleming v. USPS*, 30 M.S.P.R. 302 (1986)

Appellant notified in proposal that the reason for the removal included unscheduled absences in context with the charge of continued failure to be regular in attendance and AWOL

*Rabago v. Department of Army*, 28 M.S.P.R. 403 (1985)

Agency charged appellant failed to maintain a proper work schedule.

### **VOLUNTARY LEAVE TRANSFER PROGRAM**

**Where the denial of leave is reasonable because there is no foreseeable end in sight to the absence, it is not improper for an agency to deny the use of donated annual leave under the leave transfer program.**

*Joyner v. Navy*, 57 M.S.P.R. 154 (1993)

- Where employee who is incapacitated for duty has exhausted all his/her leave, it is not improper to deny leave without pay and place employee in AWOL status, where there is no foreseeable end in sight to employee absence and employee's absence is burden to agency.
- Agency did not abuse its discretion in declining to permit AWOL employee to receive donated annual leave under voluntary leave transfer program; agency was not required to grant employee LWOP and agency policy mandated that voluntary leave transfer program was only available where LWOP was given.